

## The Honorable Robert J. Bryan

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON**

## STATE OF WASHINGTON.

**Plaintiff,**

V.

## THE GEO GROUP, INC.,

**Defendant**

No. 3:17-cv-05806-RJB

**THE GEO GROUP INC'S MOTION  
FOR RECONSIDERATION OF ORDER  
COMPELLING DISCOVERY OF ITS  
CONFIDENTIAL FINANCIAL  
INFORMATION**

**NOTE ON MOTION CALENDAR:  
October 16, 2018**

STATE OF WASHINGTON V. GEO GROUP  
ECF CASE NO. 3:17-cv-05806-RJB  
THE GEO GROUP INC'S MOTION FOR RECONSIDERATION OF  
ORDER COMPELLING DISCOVERY OF ITS CONFIDENTIAL  
FINANCIAL INFORMATION

NORTON ROSE FULBRIGHT US LLP  
Andrea L. D'Ambra  
1301 Avenue of the Americas  
New York, NY 10019  
Telephone: (212) 318-3000

1       The GEO Group, Inc. (“GEO”) moves the Court to reconsider Section C (pages 8-11) of  
 2 the Court’s Order (ECF 133, “Order”), which compels discovery of GEO’s confidential financial  
 3 information in connection with the State of Washington’s unjust enrichment claim. In the Order,  
 4 the Court properly held that the “the State’s discovery requests are overbroad, complex, and ask for  
 5 documents that may not be in existence and are not proportional to the needs of the case.” Order  
 6 8-9. The Court also properly held that “[t]he burden and expense of responding to the discovery  
 7 requests probably outweighs their likely benefit.” *Id.* GEO recognizes that the Court has  
 8 significantly trimmed the scope of the State’s requests.

9  
 10     However, compelling any confidential financial information is of great concern to GEO  
 11 because its disclosure can compromise GEO’s trade secrets and competitive business position. *See*  
 12 Expedited Jt. Mot., ECF 126, at 5-13 (“Jt. Mot.”) (document requests). As explained below, events  
 13 since the filing of the State’s motion to compel have confirmed GEO’s concerns that the Protective  
 14 Order entered in this case (ECF 70, “Prot. Order”) may be insufficient to prevent the misuse and/or  
 15 mishandling of GEO’s financial information in this case and others that GEO is defending.  
 16

17     Further, GEO respectfully believes the Court erred by compelling discovery of confidential  
 18 financial information. *See* Order, 8-10. GEO’s financial information is irrelevant to both GEO’s  
 19 alleged liability and any possible restitution or disgorgement award for unjust enrichment for the  
 20 value of detainee labor in the Voluntary Work Program (“VWP”) at the Northwest Detention Center  
 21 (“NWDC”). In its Order, the Court did not explain how or why it reached the opposite conclusion.  
 22 The financial information is irrelevant to the unjust enrichment claim that the State has pled, and  
 23 GEO’s confidential information at issue is more likely to lead to harassment and prejudice against  
 24 GEO than to materially advance any aspect of this case. Alternatively, those actions give the Court  
 25 reason to bifurcate discovery. Consequently, reconsideration is warranted.  
 26

ARGUMENT

The Court may grant a motion for reconsideration upon either a showing of new facts that could not, with reasonable diligence, have been brought to its attention earlier or “a showing of manifest error” in a prior ruling. L.C.R. 7(h). A manifest error is one that is “plain and indisputable” and that “disregard[s] the controlling law or the credible evidence in the record.” *Gaskill v. Travelers Ins. Co.*, C11-5847, 2012 WL 13026638, at \*1 (W.D. Wash. Mar. 28, 2012).

## **I. New Information Indicates That Compelled Confidential Financial Information Is Not Sufficiently Protected.**

In the Joint Motion, GEO argued that disclosure of its highly-sensitive confidential business information is likely to be prejudicial either in court or in the public eye. Jt. Mot., 21-22. In response, the State argued that “GEO’s financial information can … be *shielded by the Protective Order*” such that “there is *no harm* or prejudice to GEO in producing it.” *Id.* at 29 (emphasis added). However, the State’s mishandling of confidential information since the Joint Motion was filed shows that GEO’s concerns are well-founded.

The Protective Order defines “confidential information” to include “Business financial information.” *See* Prot. Order, § 2(3). The Protective Order requires any third party with access to confidential information produced in this case to sign an Acknowledgement and Agreement to Be Bound. *See id.* § 4.2, Exhibit A. The Protective Order covers even confidential information that was inadvertently disclosed. *Id.* § 11.2. The State’s expert, Dr. Peter Nickerson, and seven of his associates have signed that Acknowledgement. *See* WA00007688-95.

But when the State served Dr. Nickerson’s expert report on September 20—two days *after* it filed the Joint Motion—that report contained explicit references to, and discussions of, proprietary business information in documents produced by GEO designated confidential, without

any confidential marker on the appropriate portions of the report itself.<sup>1</sup> See October 3, 2018 Letter from D. Ellison (attached as Exhibit A to this motion). An expert report containing designated confidential information is fully covered by the Protective Order's protections and subject to its requirements. See Prot. Order, § 3 ("The protections conferred by this agreement cover . . . (1) any information copied or extracted from confidential material; (2) all copies, excerpts, summaries, or compilations of confidential material; . . ."). The State and its expert failed to comply with the terms to which they agreed. Instead, the State forced GEO to note the violation and to request a new version of the expert report with the proper markings. See *id.* That this mishandling of GEO's confidential information took place ***while the State was asking the Court to order GEO to disclose a wealth of detailed confidential information***, citing ***the Protective Order itself*** as a way to avoid prejudice to GEO shows the very real risk of improper disclosure despite the Protective Order.

The risk of improper disclosure is broader yet. The Protective Order expressly contemplates the use of confidential information in the *Nwauzor* case before this Court. See Prot. Order § 4.1. While the State's service of Dr. Nickerson's report on GEO enabled it to address the State's failure, neither GEO nor the Court has any way to know whether the improperly-marked version of that report had already been disclosed to class counsel in *Nwauzor*. If so, did the State address its failure through the steps required by the Protective Order? See *id.* § 11.2. Have the underlying confidential documents or other confidential information been provided to the *Nwauzor* plaintiffs or other plaintiffs in detainee cases against GEO? Only the State can answer these questions. This demonstrated risk underscores the need for the Court to reconsider its decision to compel GEO to disclose a wide range of sensitive and proprietary financial information that is, as explained more

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<sup>1</sup> This use of confidential information and failure by the State to comply with the requirements of the Protective Order was only clear days later after a detailed review of dozens of documents cited in the State's expert report.

1 fully below, irrelevant to the State's unjust enrichment claim.

2 **II. The Court Erred By Compelling Financial Information That Is Irrelevant To**  
 3 **The State's Unjust Enrichment Claim.**

4 In light of these risks, the Court should not compel discovery of GEO's confidential and  
 5 proprietary financial information without a proper showing of relevance to the State's claims. *See*  
 6 Fed. R. Civ. P. 26(b). "Unjust enrichment is the method of recovery for the value of the benefit  
 7 retained absent any contractual relationship because notions of fairness and justice require it."  
 8 *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). The elements are "(1) the defendant  
 9 receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances  
 10 make it unjust for the defendant to retain the benefit." *Id.* at 484-85.

12 The State's claim, as pled, puts GEO on notice of no theory that would make GEO's profits,  
 13 losses, budget, or pricing information relevant. The State alleges: (1) GEO benefits from "having  
 14 necessary work done at NWDC without bearing the financial burden of *paying the minimum wage*  
 15 to those who perform such work;" (2) GEO "benefits by retaining *the difference between the \$1*  
 16 *per day* that it pays detainees *and the fair wage that it should pay*;" and (3) "[i]t is unjust for [GEO]  
 17 to retain the benefit gained from its practice of *failing to pay adequate compensation*." Complaint,  
 18 ECF 1-1, ¶¶ 4.9, 6.5, 6.6. These claims are clearly limited to allegedly unpaid compensation in the  
 19 form of *hourly* wages. The measure of the alleged unjust enrichment, if any, is the wage-value of  
 20 the detainees' work, not by any theory that makes GEO's profits or losses at NWDC, budgets, or  
 21 pricing considerations relevant. Surely the State would contend that the detainees' labor had a  
 22 value measurable in wage compensation *regardless* of whether NWDC operates at a profit or loss  
 23 or how GEO sets its budgets or competitive pricing.

26 The State must be held to the theory it has pled, and the Court should not compel discovery  
 27 on a theory never noticed by the pleadings. "Federal Rule of Civil Procedure 8(a)(2) requires that

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1 the allegations in the complaint give the defendant fair notice of what the plaintiff's claim is and  
 2 the grounds upon which it rests." *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th  
 3 Cir. 2006). Accordingly, "[a] complaint guides the parties' discovery, putting the defendant on  
 4 notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations."  
 5 *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000) (plaintiff could not proceed at  
 6 summary judgment on unpled theory because defendant had no notice of which actions to defend).

7  
 8 Without conceding that the State's unjust enrichment claim merits submission to a  
 9 factfinder, GEO submits that the narrowness of the State's unjust enrichment claim is clear in light  
 10 of the relevant Washington Pattern Jury Instruction. That instruction calls a jury to award "the  
 11 reasonable value of the [services performed] [work, labor, or property furnished]" if those services  
 12 or labor were received by a defendant that "knew or should have known" that the plaintiff  
 13 "expect[ed] payment of reasonable value." 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI  
 14 301A.02 (6th ed.). The Washington Pattern Jury Instruction on restitution uses similar language.  
 15 See *id.* 303.08. These instructions illustrate that liability for unjust enrichment is limited to the  
 16 "reasonable value" of the services performed or work furnished. The claim turns on whether a  
 17 plaintiff expected payment for labor, and whether the defendant knew or should have known that  
 18 the person expected payment of reasonable value for services rendered or work furnished. As  
 19 applied here, the State's claim alleges that GEO did not pay detainees the minimum or a "fair"  
 20 hourly wage that they allegedly expected, but instead \$1 per day. Even were this claim plausible  
 21 or meritorious—and it is not—it would not relate to GEO's profits, losses, budgets, or pricing.

22  
 23 Citing *Young*, the State argued that GEO's financial records are needed to "evaluate the  
 24 'benefit' and value of the labor provided" from GEO's perspective. See Jt. Mot. 26. But as  
 25 discussed, the benefit is simply the alleged hourly wage value of the labor, nothing more. The  
 26  
 27

1 value *Young* assigned to the benefit conferred—the increase in the value of *real property* resulting  
 2 from the plaintiff’s improvements—has no bearing in the State’s case, where the allegedly unjustly  
 3 received “benefit” from a service would be a simple math question: the delta between the hourly  
 4 rate the State alleges detainees should have received, and the \$1 per day that they did get.  
 5

6 Under no colorable theory is the State entitled to the amount VWP participants enhanced  
 7 GEO’s corporate value, just as an employee is not entitled to the profits of his employer simply  
 8 because he performed his duties as an employee. *Moberg v. Terraqua, Inc.*, 199 Wash. App. 1059,  
 9 2017 WL 3048645, at \*10 (July 18, 2017) (employee whose work increased employer’s revenue  
 10 provided no viable argument why retention of revenue was unjust). Were that the proper approach,  
 11 every employee would seek unjust enrichment restitution in the amount his services enhanced his  
 12 employer’s business to the extent the employees’ services increased its profitability. The State  
 13 cited no cases reaching that result, and it conflicts directly with cases like *Moberg*.  
 14

15 Finally, GEO submits that the State’s mishandling of GEO’s confidential information  
 16 favors bifurcation. *See* Jt. Mot. 22-25. In denying GEO’s request for bifurcation, the Court noted  
 17 that GEO “offer[ed] no explanation for why the existing protective order fails to alleviate its  
 18 concerns.” Order 11. The State’s mishandling of GEO’s confidential information in connection  
 19 with the State’s expert report demonstrates the serious risks *even under the existing protective  
 20 order*. Accordingly, to the extent the Court compels the financial discovery, GEO respectfully  
 21 requests that the Court should reconsider bifurcating discovery and staying this highly sensitive  
 22 disclosure obligation at least until dispositive motions have clarified its relevance.  
 23

24 **Modification Sought.** GEO requests the Court modify part C of the Order to deny the  
 25 State’s motion to compel with respect to Requests For Production Nos. 38, 40, 42, 43, 51, and 52,  
 26 or to bifurcate discovery until the information sought has become relevant.  
 27

1 Dated: October 16, 2018

**NORTON ROSE FULBRIGHT US LLP**  
/s/ Andrea L. D'Ambra

Andrea L. D'Ambra  
1301 Avenue of the Americas  
New York, NY 10019  
Telephone: (212) 318-3000  
Facsimile: (212) 318-3400  
andrea.dambra@nortonrosefulbright.com

**NORTON ROSE FULBRIGHT US LLP**

Charles A. Deacon  
300 Convent St.  
San Antonio, Texas 78205  
Telephone: (210) 270-7133  
Facsimile: (210) 270-7205  
charlie.deacon@nortonrosefulbright.com

**NORTON ROSE FULBRIGHT US LLP**

Mark Emery  
799 9th Street NW, Suite 1000  
Washington, DC 20001-4501  
Telephone: (202) 662-0210  
Facsimile: (202) 662-4643  
mark.emery@nortonrosefulbright.com

**LITTLER MENDELSON P.C.**

Douglas E. Smith  
One Union Square  
600 University Street  
Suite 3200  
Seattle, WA 98101  
Telephone: (206) 623-3300  
Facsimile: (206) 447-6965  
desmith@littler.com

**GREENBERG TRAURIG, LLC**

Scott A. Schipma  
2101 L Street NW, STE 100  
Washington, DC 20037  
(202)-313-3141  
schipmas@gtlaw.com

**ATTORNEYS FOR DEFENDANT  
THE GEO GROUP, INC.**

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New York, NY 10019  
Telephone: (212) 318-3000

## **CERTIFICATE OF SERVICE**

I, Susana Medeiros, hereby certify as follows:

I am over the age of 18, a resident of New York County, and not a party to the above action. On October 16, 2018, I electronically served the above Motion for Reconsideration of Order Compelling Discovery of GEO's Confidential Financial Information via ECF to the following:

8 Office of the Attorney General  
9 La Rond Baker, WSBA No. 43610  
10 Marsha Chien, WSBA No. 47020  
11 Andrea Brenneke, WSBA No. 22027  
12 Eric Mentzer, WSBA No. 21243  
13 800 Fifth Avenue, Suite 2000  
14 Seattle, WA 98104  
15 LaRondB@atg.wa.gov  
16 MarshaC@atg.wa.gov  
17 Andreab3@atg.wa.gov  
18 EricM@atg.wa.gov

16 Norton Rose Fulbright US LLP  
17 Charles A. Deacon (Pro Hac Vice)  
18 300 Convent St.  
19 San Antonio, TX 78205  
(210)-270-7133  
charlie.deacon@nortonrosefulbright.com

Norton Rose Fulbright US LLP  
Mark Emery (Pro Hac Vice)  
799 9th St. NW, Suite 1000  
Washington, DC 20001-4501  
(202)-662-0210  
[mark.emery@nortonrosefulbright.com](mailto:mark.emery@nortonrosefulbright.com)

Littler Mendelson P.C.  
Douglas E. Smith, WSBA No. 17319  
William J. Kim, WSBA No. 46792  
One Union Square  
600 University Street  
Suite 3200  
Seattle, WA 98101  
(206) 623-3300  
[desmith@littler.com](mailto:desmith@littler.com)  
[wkim@littler.com](mailto:wkim@littler.com)

Greenberg Traurig LLP  
Scott A. Schipma (Pro Hac Vice)  
Dawn A. Ellison (Pro Hac Vice)  
Jerry Stouck (Pro Hac Vice)  
2101 L Street NW, STE 100  
Washington, DC 20037  
(202)-313-3141  
[schipmas@gtlaw.com](mailto:schipmas@gtlaw.com)  
[ellisond@gtlaw.com](mailto:ellisond@gtlaw.com)  
[stouckj@gtlaw.com](mailto:stouckj@gtlaw.com)

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Andrea L. D'Ambra  
1301 Avenue of the Americas  
New York, NY 10019  
Telephone: (212) 318-3000

1 I certify under penalty of perjury under the laws of the State of Washington that the above  
2 information is true and correct.

3 DATED this 16th day of October, 2018 at New York, New York.  
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